IN THE

Supreme Court of the United States

October Term, 1976

No. 76-690

PIERRE J. LELANDAIS & CO., INC.; PIERRE J. LELANDAIS; RESEARCH & SCIENCE INVESTORS, INC.; INTERCONTINENTAL TECHNOLOGY & NATIONAL RESOURCES; CORONET FUND and CREATIVE CAPITAL FUND,

Petitioners,

against

MDS-ATRON, INC.; MOHAWK DATA SCIENCES CORP.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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Opinions Below

The opinion of the United States District Court for the Southern District of New York (Appendix B to Petition at 11a)* is reported at 387 F. Supp. 1310 (S.D.N.Y. 1974) and at CCH [1974-1975 Transfer Binder] FED. SEC. L. REP. ¶94,930. The unanimous opinion of the United States Court

* Unless otherwise indicated, references are to pages of the Appendices annexed to the Petition. References to pages of the Joint Appendix in the Court of Appeals are preceded by the letters "JA".

of Appeals for the Second Circuit (Appendix A to Petition at 1a) is reported at —— F.2d ——, and at CCH [1975-1976 Transfer Binder] FED. SEC. L. REP. ¶95,539. The orders of the United States Court of Appeals for the Second Circuit denying petitioners' petition for a rehearing *en banc* by that court (Appendix C to Petition at 34a) are not reported.

Jurisdiction

The jurisdictional requisites are adequately set forth in the Petition.

Questions Presented

This private proxy fraud case presents *no* issue worthy of review by this Court. It raises *no* conflicts among the Circuits, and presents *no* substantial questions of law. Rather, it is but an effort to obtain review of a decision of the United States Court of Appeals for the Second Circuit which applied the traditional principle that damages may not be awarded in the absence of proof that damages have been suffered.

Both the District Court and the Court of Appeals concluded that petitioners failed to present any proof of actual damages. However, the District Court awarded damages because it developed, *sua sponte* and after trial, an equitable estoppel theory as a substitute for proof of actual damages. The trial had not been conducted in reliance upon that theory. Instead, in the three-day bench trial, as the Court of Appeals found, petitioners "had ample opportunity . . . to adduce proof of what actual damages, if any, they sustained" (9a).

Upon appeal, the Court of Appeals held the equitable estoppel theory invalid, and ruled that proof of actual damages was necessary. Because the trial had not been conducted in reliance upon the equitable estoppel theory, and because petitioners had been given "ample opportunity" to prove damages (9a), the Court of Appeals

> "made an independent search of the record ourselves to see if there is *any* proof of actual damages, whether adduced by plaintiffs or by anyone else. We have found none." (8a; emphasis in original)

The Court of Appeals therefore concluded that petitioners, who failed to prove their case in their first trial, were not entitled to a second trial to present additional proof.

In light of the foregoing, the sole question raised by the petition for certiorari is:

> Whether it was an abuse of discretion for the Court of Appeals to remand this case to the District Court with instructions to dismiss, rather than with instructions to conduct a second trial to allow petitioners to attempt to prove damages which they failed to prove, although having ample opportunity to do so, at their first trial.

Statutes Involved

The pertinent provisions of the Securities Exchange Act of 1934 ("1934 Act"), §28(a), 15 U.S.C. §78bb(a), and of the Judicial Code, 28 U.S.C. §2106, are set forth in the Petition (at 3-4).

Statement of the Case

This petition for certiorari concerns the question of damages arising from alleged fraudulent misrepresentations in a proxy statement issued in connection with a stock-for-stock merger of two corporations. After trial, the United States District Court for the Southern District of New York held petitioners here to be entitled to damages, defined as the difference between the value of what petitioners gave up on the merger and the value of what they received in exchange. In other words, the District Court applied an appropriate variant of the traditional out-of-pocket tort theory of damages normally employed in fraud cases.

On appeal, neither the litigants nor the Court of Appeals questioned the propriety of employing that standard damage theory. However, what the Court of Appeals found unacceptable was an award of damages in this case by the District Court in the absence of *any* evidence that the value of what petitioners gave up was any greater than the value of what they received. Petitioners simply never established any injury: offering no evidence of the value of what they gave up, they failed to establish the crux of their case. In consequence, the Court of Appeals reversed and remanded, with instructions to dismiss the action.*

The Merger

On April 30, 1971, the shareholders of Atron Corporation ("Atron") voted, by a margin of 924,756 to 3,600, to approve a merger of Atron into MDS-Atron, Inc., a wholly-

* The Court of Appeals thus never reached the question, also raised on appeal by respondents here, of whether liability had been proven in the first place (9a-10a).

owned subsidiary of respondent Mohawk Data Sciences Corp. ("Mohawk") (JA 61). Atron was an unprofitable manufacturer of peripheral computer equipment, 90% of which was sold to a single customer: Mohawk (15a; JA 922). Pursuant to the merger, the former Atron shareholders received one share of Mohawk stock for every four shares of Atron previously held. Five of the petitioners here were among the overwhelming majority voting for the merger; petitioner Intercontinental Technology & National Resources ("ITNR") never voted.*

Pursuant to Minnesota law, which controlled the transaction, those Atron shareholders who objected to the merger could have insisted upon an appraisal and, thus, have obtained the "fair cash value" of their Atron stock instead of Mohawk stock. Minn. Stat. Ann. §§301.40, 301.44 (West 1969) (4a-5a). In fact, no Atron shareholder exercised this right of appraisal (5a; JA 61).

The Issues at Trial

Because the Atron stock which they had held was restricted, petitioners received similarly "lettered" Mohawk stock as of the date of the merger, April 30, 1971. Subsequently, on August 25, 1971, all of the petitioners, save ITNR, received unrestricted Mohawk stock in exchange for their restricted Mohawk stock (19a-21a; JA 62-63).

The petitioners commenced this lawsuit approximately one year after the merger, at a time when, for unrelated

* According to the Court of Appeals, "ITNR did not vote either way on the merger because the record holder of its stock did not forward to ITNR the proxy material in time for it to vote." (3a, n.2)

reasons, the market price of Mohawk stock had fallen sharply.* Their prime theory was that they had been promised that they would receive unrestricted, not restricted, Mohawk stock in exchange for their restricted Atron stock as of the date of the merger; the District Court found this claim to be wholly without merit (5a; 25a). Petitioners also argued that the proxy statement issued in connection with the merger omitted to state certain material facts in violation of Sections 10(b) and 14(a) of the 1934 Act (5a).

Specifically, petitioners argued that it was a material omission not to have disclosed that, prior to the merger, Mohawk had determined to change its fiscal year from one ending on July 31 to one ending on April 30 (5a). Mohawk had indeed made that determination, but had not thought it of sufficient importance to include in the proxy statement (28a).

Additionally, petitioners objected to the omission to disclose information concerning a change in one of Mohawk's methods of marketing some of the computer devices which it manufactured (29a). In 1970, Mohawk began to experiment with the practice of selling some of the computers which it had placed on long-term leases to unaffiliated third parties, subject to certain guarantees by Mohawk. Mohawk accounted for such sales by the so-called "financing method" which, in effect, booked all anticipated net revenues re-

* The District Court expressly declined to find that the decrease in the market price of Mohawk stock from May, 1971 through August, 1971 was in any way related to the "facts" which petitioners claimed should have been disclosed in the proxy statement. Instead, it found that the decline

> "was caused by a myriad of independent factors operating together, affecting the stock market in general, and computer shares in particular." (31a)

lating to any such machine in the year of the sales transaction involved. During 1970, only about 4% of Mohawk's net revenues involved this sort of third-party sale of leased equipment (JA 183, 562). Mohawk had determined to stop using this financing technique prior to the merger. However, while the decision to abandon this minor financing technique had been disclosed to the commercial press before the merger, Mohawk did not mention this decision in the proxy statement, not believing it to involve any substantial change in the nature of its business (JA 981-82).

Also, prior to the merger, Mohawk had begun to consider changing its method of accounting for such lease/sales from the above-described "financing method" to the so-called "operating method", pursuant to which net revenues were booked only as received and, thus, spread out over the life of the lease.* Respondents argued on appeal that there was no evidence sufficient to sustain the District Court's conclusion that a decision to change this method of accounting had actually been made *prior* to the merger and should have been disclosed. Since the Court of Appeals only addressed the damage question, it did not reach this issue (9a-10a).

* In petitioners' statement of facts, it is implied that some "impropriety" was involved in the use of the "financing method." However, the District Court expressly found that both the "financing method" and the "operating method"

> "were in accordance with accepted principles of accounting in 1970 and 1971" (26a; 387 F. Supp. at 1325)

and that

> "Many prestigious corporations engaged in the leasing of equipment and represented in their fiscal affairs by skilled accountants of the highest level of learning and ability, were booking their revenues in accordance with the financing method" (26a-27a; 387 F. Supp. at 1325-1326).

One consequence of Mohawk's switch from one to the other acceptable method of accounting was to defer to subsequent years the booking of certain income allocable to this 4% segment of its business. Consequently, Mohawk's reported income for 1970 was restated downward, and its 1971 results were less than would have been reported had the "financing method" been retained (JA 492-93). While, like any other change in accounting methods, this switch altered the stated income of Mohawk, it had no impact upon the underlying business reality which the accounting statements endeavored to report.

The District Court's Findings

After a three-day trial without a jury, the District Court found that respondents had violated Section 14(a) of the 1934 Act by failing to disclose their intentions (1) to change Mohawk's fiscal year and (2) to abandon the brief experimentation with third-party sales, and (3) by failing to disclose their alleged intention to change the accounting for such sales from one acceptable method of accounting to another equally acceptable method.* The District Court held these omissions to be material because "a reasonable investor *might* have considered them important" (30a; 387 F. Supp. at 1329; emphasis supplied).**

* Petitioners, as noted, brought their action under both Sections 10(b) and 14(a) of the 1934 Act. However, the trial court made no findings as to scienter, a vital element of any Section 10(b) claim. See *Ernst & Ernst* v. *Hochfelder,* 425 U.S. 185 (1976); *Republic Technology Fund, Inc.* v. *Lionel Corp.,* 483 F.2d 540, 551 (2d Cir. 1973), *cert. denied,* 415 U.S. 918 (1974). Liability, therefore, was based solely on the Section 14(a) claim.

** The trial court employed an improper standard of materiality. As this Court has now made clear, a proxy statement omission is not material unless it can reasonably be held that the omitted information

(footnote continued on next page)

Having found liability, the District Court proceeded to determine damages. It held that the proper measure of damages in this case was the difference between what petitioners gave up in the merger (their statutory right of appraisal of the fair cash value of their Atron stock) and the value of what they received upon the merger (one share of Mohawk stock for every four shares of Atron stock). As the District Court said:

> "The measure of damages is compensatory. Plaintiffs are entitled to be placed in the same position they would have enjoyed had they received the omitted information in the proxy statement, and had they voted against the merger, and pursued their dissenting shareholders' rights of appraisal." (30a; 387 F. Supp. at 1329)

Petitioners, on appeal, acknowledged that this was an appropriate method of measuring damages (Brief of Plaintiffs at 11-16). The Court of Appeals accepted the propriety of the District Court's theory of damages (6a). Respondents agreed that, if any damages were due, this was indeed the way to measure them.

The above holding represents the crux of the petition for certiorari. Under the standard formula applied by the District Court, an award of damages is dependent upon a showing of the value of the appraisal rights in Atron stock, and a further showing that such appraisal value was more than the value of the Mohawk stock issued in exchange. Petitioners declined to make *any* such showing.

would have been likely to have affected an investor's actions. *TSC Industries, Inc.* v. *Northway, Inc.,* —— U.S. ——, 96 Sup. Ct. 2126 (1976). On their appeal, respondents argued this point and contended that petitioners had failed to prove any properly-defined material omission. However, since the Court of Appeals determined at the outset that there was no proof that petitioners had been damaged, it never reached the issue of materiality.

Instead, at trial, petitioners argued that damages should be awarded on the basis of a novel "benefit-of-the-bargain" theory derived from contract law. The District Court, however, rejected that approach. Petitioners have not (and, in good faith, could not have) argued on appeal to the Court of Appeals, or in their present petition for certiorari to this Court, that it was an error of law or abuse of discretion for the District Court to decide to apply the standard tort theory of damages in this case. Indeed, in their petition for rehearing in the Court of Appeals, petitioners expressly conceded that they were "not contending that this Court erred in adopting an 'appraisal' value measure of damages . . . ." (Petition of Plaintiffs for Rehearing at 5.) Rather, petitioners now seek by indirection to question the correctness of the District Court's theory, but they failed to challenge that theory on appeal to the Court of Appeals. (Brief of Plaintiffs at 11-16.)

The problem was not with the District Court's theory of damages—a theory which was substantively sound and is now procedurally unassailable.* The problem—as the Court of Appeals found—was with the District Court's application of that theory to the record in this case.

Specifically, although the District Court found that there was no persuasive record evidence of the true value of Atron stock on the day of the merger (30a), it nevertheless proceeded to award $164,431.40 in damages to the petitioners. The District Court acknowledged that the fair cash value of the Atron stock should be determined by an analysis of its asset value, market value and investment (or earnings) value (21a). But, petitioners offered no expert

* See pp. 18-19, *infra*.

opinion as to the fair cash value of Atron stock, and the District Court ignored the ample record evidence that, by any of the aforementioned tests, the fair cash value of the Atron stock was *less* than that of the Mohawk stock given in exchange.

Instead of making a meaningful and realistic evaluation, the District Court attempted to remedy the deficiencies in petitioners' proof by invoking—really inventing—an "equitable estoppel" theory, which none of the parties had argued (30a). It held, without any basis or authority, that respondents were "estopped" from denying that the fair cash value of an Atron share in connection with the merger was worth anything less than one-fourth of the market value of a Mohawk share on March 12, 1971, or $8.60 per Atron share. (March 12, 1971 was the date "as of" which Mohawk and Atron formally agreed to the merger proposal, an agreement which had been reached in principle and publicly announced earlier, on January 29, 1971; the merger took place on April 30, 1971.) (30a)

The Issues on Appeal

On appeal, the Court of Appeals found that there was no legal justification for the invocation of this unrequested, unbriefed and unprecedented notion of an equitable estoppel: Mohawk had simply never represented to anyone that a share of Atron stock was worth $8.60 in cash at any time (8a). Indeed, it would have been most imprudent for Mohawk to have done so, since the Atron stock was objectively worth only a fraction of that amount.

The Court of Appeals, however, did not simply rely upon the District Court's finding that there was no evi-

dence as to the true value of the Atron stock. Instead it "made an independent search of the record . . . to see if there is *any* proof of actual damages, whether adduced by plaintiffs or by anyone else." (8a; emphasis in original) It found none:

> "Absent the estoppel theory which we reject, our careful examination of the record discloses that plaintiffs failed to prove the value of what they gave up when they voted for, rather than against, the merger. In terms of Minnesota law, they failed to prove the 'fair cash value,' i.e., the appraisal value, of their holdings of Atron stock as of the date the merger was authorized. Loss of the value of their appraisal rights is the underpinning of their claim of damages. In short, they failed to prove what actual damages, if any, they sustained as a result of the exchange." (8a-9a)

The Court of Appeals further observed that the "record is clear" that petitioners "had ample opportunity to present whatever proof [of damages] they had. They declined to do so." (9a, n. 6)

Given the total absence of any proof of injury, the Court of Appeals had no alternative but to reverse and remand with directions to dismiss. By deciding on that basis, it was not necessary for the Court of Appeals to reach any of the several substantial questions respondents had raised on appeal relating to the basic issue of liability.

POINT I

The decision below is clearly correct.

A. The courts below applied the appropriate measure of computing damages, and properly found that petitioners failed to prove any injury.

Petitioners attempt to transform a narrow factual issue —the failure to prove damages—into a legal issue worthy of certiorari by arguing that "the Court of Appeals erred in announcing an exclusive rule for measurement of merger fraud damages," thereby rejecting the advice set forth in *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, 386 (1970), that District Courts should exercise "sound discretion" in selecting suitable and flexible remedies under Section 14(a) of the 1934 Act (Petition at 2).

The Court of Appeals announced *no* such exclusive rule here. Instead, it merely found that, on the record in this case, there was a total absence of *any* proof of damages, under the standard fraud measure of damage applicable to these facts.

Both the District Court and the Court of Appeals used the same approach in calculating damages: damages were the difference between the value of the Atron stock which petitioners gave up, and the value of the Mohawk stock which they received (6a; 30a). In addition, both the District Court and the Court of Appeals concluded that petitioners failed to prove the first half of that formula—the value of the Atron stock—even though they were given ample opportunity to do so (8a; 30a).

The only reason the District Court awarded petitioners damages was that the District Court developed, *sua sponte* and after trial, an equitable estoppel theory as a substitute for proof of the value of the Atron stock. The District Court concluded that Mohawk was "estopped" from denying that the fair *cash* value of the Atron stock, at the time of the merger, was less than the proportionate *market* value of the Mohawk stock offered in exchange on the day "as of" which the merger agreement was signed (30a-31a).

The Court of Appeals held this approach invalid, stating that it amounted to holding Mohawk to an agreement to pay cash for the Atron stock, an offer which Mohawk never made (8a).

Petitioners mischaracterize the Court of Appeals' holding when they state that the court "held that the value which defendants placed on plaintiffs' stock could not be considered as evidence of the value of that stock." (Petition at 10) There is nothing in the Court of Appeals' opinion which suggests that Mohawk's valuation of the Atron stock was inadmissible evidence which could not be considered in computing damages. The market value of Mohawk stock was not held to be incompetent evidence; but, obviously, the market value of Mohawk stock on March 12, 1971 was inadequate evidence, standing alone, to prove the fair cash value of the stock of another company, Atron, six weeks later, on the date of the merger, April 30, 1971.

Upon concluding that the District Court's employment of an equitable estoppel doctrine was invalid, the Court of Appeals, as noted,

> "made an independent search of the record ourselves to see if there is *any* proof of actual damages, whether adduced by plaintiffs or anyone else. We have found none." (8a; emphasis in original)

Indeed, the evidence in the record all pointed in the opposite direction. Not only did petitioners fail to prove any damages, but they could *not* have done so. There simply were none.

Atron was a failing company. It had lost money in every period since its inception (JA 561). In January of 1971, the company learned that, in addition to losing money, it was about to lose what amounted to its sole customer: Mohawk (JA 420). At the time of the merger, Atron had no profits, no customers, no future and ever dwindling reserves (JA 442, 783-84). On the day of the merger, April 30, 1971, Atron stock had no per share income value, never having had any income. According to Atron's own books, the per share net asset value was in the neighborhood of $3.00 (JA 557, 582).

There was a thin over-the-counter market for Atron stock (JA 54-57). The District Court correctly found that, subsequent to the January 29, 1971 announcement of the Atron/Mohawk merger plans, the Atron market was controlled by arbitrage (30a, n. 9). Thus, given the announced one-for-four exchange ratio, the quotations for Atron stock, after January 29, 1971, essentially reflected 25% of the prevailing market price for Mohawk stock on the New York Stock Exchange, where it traded. During the period from January 4 through January 29, 1971, before the merger was announced, the average bid price for Atron stock was approximately $6.88 (JA 791). These bids, however, occurred prior to any public disclosure that Atron's single largest customer, Mohawk, was about to start manu-

facturing the very product it had been buying from Atron. Absent a merger, the disclosure of that fact could only have sent Atron stock prices crashing.

The fact that Mohawk was willing to offer a premium in its own "paper" for Atron stock does not alter this analysis. As the Court of Appeals concluded, it is a fact of commercial life that paper flows far more freely than cash, and it is a common experience that acquiring companies offer such premiums (8a).*

Under all the circumstances, it seemed apparent, as respondents argued on appeal, that the fair cash value of the Atron stock on the date of the merger, April 30, 1971, however measured, was in the range of $3 to $4 per share, substantially less than the value of the Mohawk stock given in exchange.

On April 30, 1971, Mohawk stock was selling for $44.64 per share. Thus, the value of a quarter Mohawk share received by the owner of a single Atron share was, on that date, $11.16—about three times the fair cash value of an Atron share (30a). These petitioners, it is true, did not receive unrestricted Mohawk stock until August 25, 1971. On that date, the market price of Mohawk was $28.38 or $7.09 per quarter share—still twice the true value of the Atron

* The conclusion of the Court of Appeals on this point is most apt, and worthy of quotation in full:

> "The stock-for-stock exchange here, as defendants point out, was based on the fact of commercial life that paper flows more freely than money. Furthermore, it is not uncommon for a company proposing a merger to offer a price including a premium which reflects a special value of the target company to the company proposing merger or is regarded as a necessary inducement to the voting shareholders of the target company to accept the proposal." (8a)

stock on April 30.* (Brief of Defendants in Court of Appeals at 34 n.) Petitioners, in their post-trial memorandum in the District Court, conceded that the value of each Mohawk share received by them on April 30 was $28.25, or $7.06 per quarter share. (*Id.* at 34)

Nevertheless, in calculating damages, the District Court, inexplicably, did not use the actual market price of Mohawk stock on April 30, 1971, or on August 25, 1971, to determine the value of such stock to Atron shareholders. Instead, it held that the relevant value of Mohawk stock was the *lowest* price at which Mohawk stock sold in the 30-day period after August 25 (32a). The District Court compounded its error by holding that such price was $21.50 (or $5.38 per quarter share), a price which was lower than the lowest price at which Mohawk stock actually traded in that 30-day period. (Brief of Defendants in Court of Appeals, Table B3)

On appeal, respondents argued that this was an indefensible way to measure the value of the Mohawk stock given to petitioners in connection with the merger on April 30, 1971. However, even at the $5.38 valuation, we argued, the Mohawk stock which petitioners received was worth significantly more than the fair cash value of the Atron

* As previously noted (p. 6 n., *supra*), the District Court declined to find that the decrease in Mohawk's market price during the summer of 1971 was related to the "facts" which petitioners claimed should have been disclosed in the proxy statement (31a). Indeed, the news about Mohawk's change in fiscal year and decision to abandon the financing device of selling leased machines to third parties, which the District Court held should have been disclosed before the merger, was in fact disclosed at a meeting of securities analysts on May 4, 1971. On that date, Mohawk closed at $44⅞—up slightly from its price on the day of the merger. On May 5, 1971, a full day after this allegedly momentous disclosure, Mohawk closed off ⅛, at 44¾. (Brief of Defendants in Court of Appeals, Table B3.)

stock which they gave up. While not necessary for the Court of Appeals to decide this question, it did observe that

> "it seems fairly clear that the bottom line would be negative even if we were to take the Mohawk stock at the much lower value it had when plaintiffs were able to sell the restricted stock issued in respect of their restricted Atron shares" (9a, n.6).

It is thus apparent that the Court of Appeals' conclusion on damages was not only well-founded, but fair. Petitioners did not, and could not, prove any damages.

B. The courts below properly rejected petitioners' contract theory of damages.

At trial, petitioners argued that they should receive damages based on a contract theory. They claimed that they had been promised Mohawk stock worth $44.64 per share and that they were entitled to the benefit of that "bargain." Even though petitioners had speculatively retained their Mohawk stock for months or years after they were free to sell it,* they argued that their damages were the difference between $44.64 and the price at which they eventually sold Mohawk. Neither the District Court nor the Court of Appeals saw any merit in this contract damage theory (6a; 30a). Petitioners were unable to cite a single proxy fraud case where damages were in fact awarded pursuant to any such formula.

Indeed, although petitioners presented their contract theory of damages, as an alternate approach, to the Court of Appeals, they acknowledged that the tort measure of damages employed by the District Court was an appropriate one. (Brief of Plaintiffs at 11-16) Having conceded the issue before the Court of Appeals, petitioners should not be permitted to raise it here. *Cort* v. *Ash*, 422 U.S. 66, 73-74 n.6 (1975).

* Some of petitioners were still holding their Mohawk stock at the time of trial (JA 63).

Petitioners here cite two cases which they claim authorize some sort of contract theory: *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970), and *Chasins* v. *Smith, Barney & Co.*, 438 F.2d 1167 (2d Cir. 1970). Neither case in fact advances petitioners' position.

As to *Mills*, petitioners refer to a brief dictum in which Mr. Justice Harlan suggested that, in the context of a derivative action, damages could, under some circumstances, perhaps be computed by awarding plaintiffs the value of that which was represented as coming to them. As the Court of Appeals here pointed out (7a, n.5), plaintiffs in this type of case are very fond of selectively quoting from Mr. Justice Harlan's opinion, but always take special pains to avoid quoting that passage in which he stated that:

> ". . . damages should be recoverable only to the extent that they can be shown" (396 U.S. at 389).

As noted, petitioners showed no such damages here.

The *Chasins* case is, on its face, inapplicable since it arose from a violation of Section 10(b) of the 1934 Act, not Section 14(a), as here. However, the damage theory employed in *Chasins* is not fundamentally inconsistent with the theory used here. Chasins purchased certain securities at the recommendation of his broker without having been informed that the broker was making a market in those very

securities (438 F.2d at 1169-70). If Chasins had known this fact, presumably he would not have purchased the securities. The court thus endeavored to return Chasins to the *status quo ante* by awarding him the difference between the purchase price, and the deflated price at which he subsequently sold such securities. Chasins, however, unlike the petitioners here, started off with cash. (*Id.* at 1173.)

As noted, petitioners here, *status quo ante,* held restricted stock in a failing company. Unlike Chasins, they did not lose cash, but only lost the statutory right to the appraised fair cash value of their stock. That is precisely what the District Court here endeavored to give back to them: the value of their appraisal rights. That value is precisely what these petitioners failed to prove.

Petitioners received Mohawk stock which they held for appreciable periods as a speculative investment. For unrelated reasons, the investments soured (31a). Petitioners, we suggest, then proceeded to pore over the proxy statement in the hope of finding some arguable omission, upon which they could base a proxy fraud claim and seek to recover from Mohawk the paper losses which they experienced as a result of their own speculations.

To allow damages to be measured by such losses on subsequent speculation would fly in the face of the express provision of the 1934 Act that no person shall receive an award "in excess of his actual damages on account of the act complained of." (15 U.S.C. §78bb(a)). To adopt such a principle would be to convert every proxy statement into a potential insurance policy against all subsequent capital losses. That was not the purpose of the 1934 Act. Not only

was it within the discretion of the courts below to decline to apply petitioners' contract theory of damages to the facts here, we submit, but it was incumbent upon them to refuse to do so.

POINT II

There is no conflict of decision among the Circuits.

Petitioners seek review on the ground that the decision below conflicts with a 1973 decision of the United States Court of Appeals for the Seventh Circuit in *Swanson* v. *American Consumers Indus., Inc.*, 475 F.2d 516 (7th Cir. 1973). The *Swanson* case was fully briefed below, and the Court of Appeals here was apparently persuaded by respondents' argument that, far from a conflict, *Swanson* required the very result reached here.

Petitioners cite *Swanson* for the proposition that, in a stock-for-stock merger, the fair cash appraisal value of the stock of the acquired company should be no less than the proportionate market value of the stock of the acquiring company issued in exchange. Petitioners, however, omit to advise this Court that the two companies involved in *Swanson* had reached a pre-merger agreement as to what *was* the fair cash value of the Peoria Service Company stock being acquired. As stated in the *Swanson* trial court opinion,

> "The total exchange evaluation of about $285,000 was based on the anticipated liquidation value of those assets." (328 F. Supp. 797, 803 (S.D.Ill. 1971))

Thus, the defendant in *Swanson* had expressly agreed that each share of Peoria Service Company stock had a fair

cash value of $3.55, the figure which the court in *Swanson* used as the appraisal value.

If Mohawk had ever agreed that Atron stock had a fair cash value of $8.60 per share—the value determined under the District Court's equitable estoppel doctrine—we would have a very different case here. But that did not occur. As the Court of Appeals here stated:

> ". . . at no time did Mohawk represent to the Atron shareholders that their shares had a fair cash value of $8.60 per share . . . . The merger was a stock-for-stock exchange, not a stock-for-cash one. Whatever might be said regarding an estoppel approach if the merger had been a stock-for-cash one, we are not called upon to decide that issue." (8a)

There is nothing in the record which suggests that Mohawk ever hinted a willingness to pay anything like $8.60 cash for a share of Atron.

The Seventh Circuit in *Swanson* held that, upon proof of a Section 14(a) proxy fraud in a stock-for-stock merger, damages should be measured by the difference between the value of the appraisal rights given up and the value of the stock received in exchange. That holding is absolutely consonant with the conclusions of the Second Circuit in the present case. In *Swanson,* the record established the cash value of the abandoned appraisal rights; injury was proved and damages could be awarded. On the instant record, there was *no* evidence that the appraisal rights which petitioners waived were worth one penny more than the Mohawk stock which they received. Indeed, the evidence was to the contrary.

Thus, there is no conflict among the Circuits on this principle.

POINT III

There is no substantial question of law for this Court to review.

The only remaining question raised in the petition is whether it was an abuse of discretion for the Court of Appeals not to remand this matter for receipt of further evidence on damages. The question, we submit, is frivolous.

The decision whether to remand for a new trial, or simply reverse and direct dismissal of the complaint, rested in the sound discretion of the Court of Appeals. (28 U.S.C. §2106) That discretion was not abused. The Court of Appeals, as previously noted, reviewed the record and reflected carefully upon what petitioners declined to prove and what respondents carefully demonstrated: the minimal fair cash value of Atron common stock.

Petitioners now contend that they failed to prove damages only because they "could not reasonably [have] anticipated" the method of computing damages employed by the Court of Appeals. (Petition at 13) First, petitioners state that the Court of Appeals in effect invented the "appraisal" theory of damages, ignoring the clear fact that the District Court first applied this obvious approach. Petitioners go on to state,

> "In doing so the Court of Appeals acknowledged that it previously had not discussed this newly-announced 'apprisal' [sic] method of calculating damages in §14(a) actions." (Petition at 12)

But the Court of Appeals acknowledged no such thing. To the contrary, it pointed to *Gerstle* v. *Gamble-Skogmo,*

Inc., 478 F.2d 1281, 1303-08 (2d Cir. 1973), as a clear precursor of the present approach:

> "[In *Gerstle*], we had a very complicated problem as to the measure of damages for a false proxy statement. A somewhat simplified statement of our result was that we allowed the minority stockholders of the merged company to recover the amount actually obtained on sales of certain properties concerning which undervaluing misrepresentations had been made, plus the value of other assets at the date of merger, less the market value of the stock which the minority stockholders received. This is not altogether unlike an estimate of what would be obtained on an appraisal, although we did not put it in those terms." (9a)

Petitioners try to avoid the precedential force of *Gerstle*, but the effort is unconvincing. Petitioners assert that,

> "Only in *Gerstle* v. *Gamble-Skogmo Inc.,* 478 F.2d 1281 (2d Cir. 1973), had [the Court of Appeals] ever before considered §14(a) damage questions, and admittedly neither the phraseology nor the computational methodology of that decision previewed adoption of the 'appraisal' method announced in the present action." (Petition at 12-13)

Contrary to petitioners' assertion as to what the Second Circuit "admitted" here, that Court, as we have just seen, expressly characterized *Gerstle* as a preview of this case.* Petitioners' suggestion of surprise, therefore, is out of order.

Nor could petitioners have been "surprised" by reason of the Court of Appeals' invalidation of the District Court's

* It should be noted in passing that petitioners' apparent suggestion that the damage theory in *Gerstle* somehow differs from the instant theory undercuts their other argument that the Second Circuit here announced an exclusive rule for measuring damages in Section 14(a) cases. (Petition at 9)

equitable estoppel theory. As noted above, the District Court developed that theory only *after trial,* and after petitioners had been given "ample opportunity" to present whatever proof they had on the damage issue (9a). Petitioners' failure at trial to prove the fair cash value of Atron stock, therefore, was by no means caused by their reliance on that erroneous theory of law—but by their lack of any evidence.

When a Court of Appeals concludes, as it did here, that a plaintiff has been given ample opportunity to prove his case, and simply has failed to do so, it is entirely appropriate for the Court of Appeals to reverse, and order the complaint dismissed, rather than remand for a second trial. See *United States* v. *Generes,* 405 U.S. 93, 106 (1972); *Neely* v. *Eby Constr. Co.,* 386 U.S. 317, 321 (1967); *Insurance Co. of North America* v. *Chinowith,* 393 F.2d 916, 920 (5th Cir.), *cert. denied,* 393 U.S. 990 (1968). Indeed, the sound use of judicial resources compels that result; if a plaintiff was given a full opportunity to prove damages in his first trial, and failed, he is not entitled to a second bite at the apple.

The Court of Appeals in this case followed quite the same approach employed by this Court in *United States* v. *Generes, supra.* The plaintiff there had prevailed at trial and on appeal in an action for a tax refund. This Court determined that the trial court had given an erroneous jury instruction, on a question of apparent first impression, which was favorable to the plaintiff. That error required reversal. Instead of remanding for a new trial, however, this Court "examined the record," and found nothing which could support a verdict for the taxpayer. This Court, therefore, directed entry of judgment for the Government.

The situation here is even stronger. Not only did petitioners not prove their damages at trial, they have never—neither here nor in their petition for rehearing to the Court of Appeals—articulated one scrap of evidence they would adduce, if given the second chance, to show that the fair cash value of the Atron stock they gave up was greater than the value of the Mohawk stock they received. On the other hand, respondents, both in the Court of Appeals and here, have endeavored to show that the reverse is true.

Contrary to petitioners' contention, the approach of the Court of Appeals in this case is consistent with the approach used by the same Court in *Chris-Craft Indus., Inc.* v. *Piper Aircraft Corp.*, 480 F.2d 341 (2d Cir.), *cert. denied*, 414 U.S. 910 (1973) (*"Chris-Craft II"*), *after remand*, 516 F.2d 172 (2d Cir. 1975), *cert. granted*, 425 U.S. 910 (1976) (*"Chris-Craft III"*),* and also with the holdings in *Edina State Bank* v. *Mr. Steak, Inc.*, 487 F.2d 640 (10th Cir. 1973), *cert. denied*, 419 U.S. 883 (1974), and *World Prods., Inc.* v. *Central Freight Serv., Inc.*, 342 F.2d 290 (3d Cir. 1965). In each of those cases, the appellate court found that the trial record showed that the plaintiffs were entitled to some damages, or to greater damages than had been awarded by the trial court; those cases were remanded so that the plaintiffs could receive awards that the Circuit courts were persuaded plaintiffs should have won. Here, we have the reverse.

The rulings of law in *Chris-Craft* and this case are consonant; the only difference is in the facts. In *Chris-Craft*

* Petitioners' citation of *Chris-Craft* is touched with a special irony since two of the three judges who sat on the panel of the Court of Appeals which decided this case (Friendly, Mansfield, Timbers, JJ.) also sat on the panel which decided *Chris-Craft III* (Mansfield, Oakes, Timbers, JJ.).

III, the Court of Appeals found that the record showed proof of damages, and the court thus directed entry of judgment awarding those damages. In this case, the record showed a failure to prove damages, and the Court of Appeals thus directed that the complaint be dismissed.

Conclusion

No purpose would be served by issuing a writ of certiorari in this case. There is no conflict among the Circuits as to the legal principle applied below, *i.e.*, that only actual damages may be awarded to claimants under the 1934 Act, and no damages may be awarded at all unless they have been proven. Here there was no such proof.

Petitioners complained that they were injured as a result of a stock-for-stock merger but, at trial, they declined to provide evidence of the true value of what they gave up on this exchange—much less, evidence that what they received was worth less than what they gave up for it. For this reason, the Court of Appeals was compelled to conclude that petitioners had failed to prove their case. In so doing, the Court of Appeals announced no new rule, but merely applied basic principles to this record.

It was not an abuse of discretion for the Court of Appeals to decide this case upon the trial record and to direct dismissal. Petitioners have no right to a second chance to produce evidence of injury—evidence which even now they are unwilling or unable to identify.

In short, the decision below should not be disturbed and need not be reviewed.

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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